No. 15782

United States
COURT OF APPEALS
for the Ninth Circuit

ADOLPH G. HOFFMAN,

Appellant,

v.

C. H. HALDEN, DR. DONALD E. WAIR, DR. G. F. KELLER and DR. F. SYDNEY HANSEN,

Appellees.

BRIEF OF APPELLEE DR. G. F. KELLER

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge.

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SUBJECT INDEX

Page

Statement of the Case ... 1

1. The complaint ... 2
2. The amended complaint ... 3
3. The second amended complaint ... 4

Summary of Argument ... 7

Argument:

I. General conclusory allegations of alleged acts as malicious, conspiratorial and done for the purpose of depriving a person of his constitutional rights, when unsupported by the complaint read as a whole, are an insufficient basis upon which to found an enforceable claim under the Civil Rights statutes ... 8

II. The second amended complaint fails to state an enforceable claim for relief against defendant Keller under any of the statutory and constitutional provisions upon which plaintiff relies ... 10

1. Article 1, Section 8, Constitution of the United States ... 10
2. Article 4, Section 4, Constitution of the United States ... 11
3. Amendment 13, Constitution of the United States ... 11
4. Amendment 14, Constitution of the United States ... 11
5. Title 18 U.S.C. Sections 231, 241, 242 ... 12
6. Title 28 U.S.C. Sections 1331 and 1343 ... 12
7. Title 52 U.S.C. Section 203 ... 12
8. Title 42 U.S.C. Sections 1981-1988 ... 13

Conclusion ... 23

TABLE OF CASES

Page

Agnew v. City of Compton, 239 F.(2d) 226, 231 (CA9), cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910 ..... 8, 10, 12

Bomar v. Keyes, 162 F.(2d) 136 (CA2) 22

Burt v. City of New York, 156 F.(2d) 791 (CA2) 22

Campo v. Niemeyer, 182 F.(2d) 115 (CA7) 19

Collins v. Hardyman, 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253 ..... 9, 18, 23

Copley v. Sweet, 133 F. Supp. 502 (W.D. Mich.), aff'd 234 F.(2d) 660, cert. den. 352 U.S. 887, 77 S. Ct. 132, 1 L. Ed. 91 12

Cuiksa v. City of Mansfield, 250 F.(2d) 700 (CA6) 20, 23

Davidow v. Lachman Bros. Investment Co., 76 F.(2d) 186 (CA9) 18

Dineen v. Williams, 219 F.(2d) 428, 430 (CA9) 21, 23

Glicker v. Michigan Liquor Control Commission, 160 F.(2d) 96 (CA6) 22

Kenney v. Fox, 232 F.(2d) 288 (CA6), cert. den. 352 U.S. 855, 77 S. Ct. 84, 1 L. Ed. (2d) 66 ..... 19, 23

Kenney v. Hatfield, 132 F. Supp. 814 (W.D. Mich.) 19

Mattheis v. Hoyt, 136 F. Supp. 119 (W.D. Mich.) 12

McGuire v. Todd, 198 F.(2d) 60, 63 (CA5), cert. den. 344 U.S. 835, 73 S. Ct. 44, 97 L. Ed. 650 8

McShane v. Moldovan, 172 F.(2d) 1016 (CA6) 22

Pacific States Telephone Company, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 11

Patten v. Dennis, 134 F.(2d) 137 (CA9) 12

Picking v. Pennsylvania R. Co., 151 F.(2d) 240 (CA3) 22

Pollock v. Williams, 322 U.S. 4, 64 S. Ct. 792, 88 L. Ed. 1095 11

TABLE OF CASES (Cont.)

Page

Rennie & Laughlin, Inc. v. Chrysler Corporation, 242 F.(2d) 208 (CA9) 9

Ryan v. Scoggin, 245 F.(2d) 54, 57 (CA10) 9

Schatte v. International Alliance, etc., 182 F.(2d) 158 (CA9), rehearing den. 183 F.(2d) 685, cert. den. 340 U.S. 827, 71 S. Ct. 64, 95 L. Ed. 608, rehearing den. 340 U.S. 885, 71 S. Ct. 194, 95 L. Ed. 643 ..... 18, 19

Smith v. Jennings, 148 F. Supp. 641, 645 (W.D. Mich.) 19

Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 283, 95 L. Ed. 1019 ..... 9, 22

United States v. Cruikshank, 92 U.S. 542, 23 L. Ed. 558 11

Whittington v. Johnston, 201 F.(2d) 810 (CA5), cert. den. 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377 21

MISCELLANEOUS

18 U.S.C. Sections 231, 241, 242 12
28 U.S.C. Sections 1331 and 1343 12
52 U.S.C. Section 203 12
42 U.S.C. Sections 1981-1988 13

Oregon Laws of 1949, Chapter 571 (now codified in ORS 426.070-426.170 14

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BRIEF OF APPELLEE DR. G. F. KELLER

Appeal from the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge.

STATEMENT OF THE CASE

Plaintiff appeals from a judgment (Tr. 18-20) dated October 14, 1957, which dismissed the second amended complaint upon one of the grounds urged by all the defendants in their respective motions to dismiss (Tr. 14-17), to wit: that the said pleading failed to state an enforceable claim against the defendants upon which relief could be granted.

Jurisdiction of the district court was not predicated upon diversity of citizenship. The second amended complaint alleges that plaintiff and all the defendants are Oregon citizens. Plaintiff seeks to found jurisdiction and base his damage claim of $201,200.00 upon a number of federal statutes relating to civil rights (Tr. 3).

1. The complaint.

The original complaint which was filed by plaintiff *pro se* on January 16, 1954, named Ashby C. Dickson, a judge of the Multnomah County Circuit Court, C. H. Halden, F. H. Dammasch, M.D., G. F. Keller, M.D., John Doe, Jane Doe and Richard Roe as defendants (Supp. Tr. 27-29). Therein plaintiff sought to recover compensatory damages of $1,200.00 and punitive damages of $1,500,000.00 on account of defendants' alleged conspiracy on or about January 10, 1952, to cause him to be deprived of his liberty and to be confined to the state mental hospital at Pendleton, Oregon, for 79 days. It was claimed that a hearing was held before Judge Dickson at which plaintiff "was adjudged mentally ill, on the strength, in part, of affidavits, wholly or in part false" signed by Doctors Dammasch and Keller. Plaintiff also alleged that Judge Dickson refused to allow him representation by counsel, and impaired his civil rights in other ways. Defendant Halden was alleged to have "flimflammed and bamboozled" plaintiff by advising him to remain silent and let Halden speak for him (Supp. Tr. 28-29).

Since service of process was not made upon the defendants, the action was dismissed by Judge McColloch

on August 10, 1954, for failure to prosecute (Supp. Tr. p. 30). Over two years later, on October 8, 1956, plaintiff's attorney filed a motion to set aside the dismissal order, and on November 1, 1956, the court entered an order vacating the order of dismissal (Supp. Tr. 31).

2. The amended complaint.

On December 18, 1956, plaintiff's attorney filed an amended complaint which dropped Judge Dickson, Dr. Dammasch and John Doe, Jane Doe and Richard Roe from the case, but attempted to add Dr. F. Sydney Hansen, County Health Officer of Multnomah County, and Dr. Donald E. Wair, Superintendent of the Oregon State Mental Hospital at Pendleton as additional defendants (Supp. Tr. 31-38). In the amended complaint, defendant Keller was identified as "a duly licensed physician within the State of Oregon." The amended complaint raised the prayer for compensatory damages to $26,-200.00, but reduced the demand for punitive damages to $100,000.00. It was alleged that the state court mental hearing was held on January 10, 1952, and that plaintiff was subsequently confined to the state hospital from August 5, 1952, to October 23, 1952 (Supp. Tr. 35).

It is unnecessary to consider the amended complaint further because it was dismissed with leave to amend by Judge Mathes on the ground that it failed to state a claim upon which relief could be granted (Supp. Tr. 38-39).

3. The second amended complaint.

In substance, the second amended complaint which was filed March 4, 1957, alleges that plaintiff was unlawfully incarcerated at the state mental hospital pursuant to a commitment proceeding in which defendants participated. As a result, it is claimed that plaintiff sustained damages and loss of earnings in the sum of $101,-200.00. Punitive damages of $100,000.00 are also demanded. This pleading consists largely of conclusions and exhortations to the effect that defendants conspired to deprive plaintiff of equal protection of law, due process, and of other undefined rights secured by the United States Constitution or the laws of the United States. The allegations are elaborate but, in substance, charge that defendants state and county officers and defendant Keller, a private physician, in participating in a state court proceeding in which plaintiff was charged with mental illness, failed to assure that plaintiff was not deprived of his rights in the proceeding. The allegations of the second amended complaint differ from those in the first amended complaint only in their length; the substance thereof is identical.

With respect to defendant Keller, the second amended complaint merely alleges that he is a duly licensed and practicing physician (Tr. 4). Paragraph VII contains a number of conclusory allegations to the effect that up to June 18, 1956, all the defendants conspired to deprive plaintiff of the equal protection of the laws of Oregon and of his constitutional rights; that they conspired ". . . to impede, hinder, obstruct and defeat the due course and due process of law in the State of Oregon"; that they

conspired ". . . to deprive plaintiff of the rights, privileges and immunities secured by the Constitution and laws of the United States . . ."; and that ". . . all of said acts and those set forth throughout this complaint were committed by defendants, and each of them, while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity" (Tr. 4-5).

In paragraph VIII plaintiff purports to allege the specific acts committed by defendants Halden and Hansen alone in furtherance of the alleged conspiracy (Tr. 5-9). In pargraph IX plaintiff claims that certain specific acts were committed by defendant Keller in furtherance of the conspiracy, while "acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and in wilful, malicious, intentional and discriminating misuse of his authority and that of other agencies of the State of Oregon including the Circuit Court for Multnomah County and Morningside Hospital . . ." (Tr. 9). These eleven alleged specific acts may be paraphrased as follows:

(1) Making a superficial medical and psychological examination of plaintiff in contravention of the court's order to make an adequate examination;

(2) Certifying under oath to the court that plaintiff was incompetent despite the fact that a complete examination would have revealed the contrary;

(3) Signing a certificate containing information concerning plaintiff although he knew this information was extremely limited and unverified;

(4) Verifying a statement concerning plaintiff which contained numerous inaccuracies;

(5) Refusing plaintiff's request at the time of hearing for an adequate mental examination;

(6) Suppressing facts regarding plaintiff's illegal detention and participating in a hearing without objecting, although it was within his power to object, that plaintiff was being deprived of his constitutional rights;

(7) Failing to object at the hearing to the following procedure:

(a) That plaintiff was given no opportunity to cross-examine witnesses;

(b) That plaintiff was excluded from hearing the testimony of witnesses;

(c) That plaintiff was given no opportunity to summon counsel or representative in his behalf;

(d) That plaintiff was given no opportunity to testify in his own behalf except for a few preliminary statements;

(e) That the District Attorney of Multnomah County was not present;

(8) Wilfully participating at the hearing without objecting that the statute under which the hearing was convened was unconstitutional;

(9) Refusing to examine plaintiff while he was held at Morningside Hospital on August 5, 1952;

(10) Refusing to release plaintiff immediately while he was held at Morningside Hospital since he knew that plaintiff had been confined under void proceedings;

(11) Refusing to direct defendants Halden and Hansen to deliver plaintiff to the Circuit Court, Multnomah County, rather than to Morningside Hospital on August 5, 1952, after he, personally or through his agents, knew that Halden and Hansen had disobeyed the court's order directing that plaintiff be delivered to the court rather than to Morningside Hospital.

SUMMARY OF ARGUMENT

1. In passing upon the correctness of the judgment appealed from, the court should consider only the things which defendant Keller is alleged to have done, or omitted to do, as distinguished from the conclusory allegations and factually unsupported characterizations of the complained of acts.

2. This is a case which justified and indeed compelled the district court to grant the motion to dismiss as against Dr. Keller, because the second amended complaint failed to state an enforceable claim under any of the statutory and constitutional provisions upon which plaintiff relied.

3. The Fourteenth Amendment and the Civil Rights Act are not applicable to individuals who do not act pursuant to or under color of state law.

4. The second amended complaint fails to state any facts showing that the acts complained of were done by defendant Keller under color of state law.

5. Plaintiff's counsel had two opportunities to allege facts giving rise to an enforceable claim against Dr. Keller under the Civil Rights Acts. The district court's dismissal of the second amended complaint without leave to amend was made in the exercise of its sound judgment and discretion.

ARGUMENT

I

General conclusory allegations of alleged acts as malicious, conspiratorial and done for the purpose of depriving a person of his constitutional rights, when unsupported by the complaint read as a whole, are an insufficient basis upon which to found an enforceable claim under the Civil Rights statutes.

As shown above, the second amended complaint is replete with allegations that all the defendants while acting under the color of state law entered into a conspiracy to deprive plaintiff of his constitutional rights, that they conspired to hinder, obstruct and defeat the due course and due process of justice, and that they intentionally and maliciously discriminated against plaintiff and subjected him to inequality of treatment and denied to him the equal protection of the laws. However, in passing upon the correctness of the judgment appealed from, such conclusory allegations will be rejected when unsupported by the pleading, read as a whole (*Agnew v. City of Compton,* 239 F.(2d) 226, 231 [and cases cited at note 11] (CA9), cert. den. 353 U.S. 959, 77 S. Ct. 868, 1 L. Ed. (2d) 910). As stated by Judge Hutcheson in *McGuire v. Todd,* 198 F.(2d) 60, 63 (CA5), cert. den. 344 U.S. 835, 73 S. Ct. 44, 97 L. Ed. 650:

> "It is sufficient for us in this case to say: that, as other courts have done, we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from

> the conclusions of the pleaders with respect to them, do not constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; and that the judgment dismissing the complaint should be affirmed."

While a motion to dismiss for failure of the complaint to state an enforceable claim admits all facts well pleaded, such a motion " . . . does not admit unwarranted inferences drawn from the facts or footless conclusions of law predicated upon them" (*Ryan v. Scoggin,* 245 F.(2d) 54, 57 (CA10)).

The general views of this court on the granting of a motion to dismiss for failure to state an enforceable claim were reaffirmed in *Rennie & Laughlin, Inc. v. Chrysler Corporation,* 242 F.(2d) 208 (CA9), where Judge Barnes stated in part (p. 213):

> "This is not to say or imply that a motion to dismiss should never be granted. It is obvious that there are cases which justify and indeed compel the granting of such motion. The line between the totally unmeritorious claims and the others cannot be drawn by scientific instruments but must be carved out case by case by the sound judgment of trial judges. That judgment should be exercised cautiously on such a motion."

The decisions of the United States Supreme Court in *Tenney v. Brandhove,* 341 U.S. 367, 71 S. Ct. 283, 95 L. Ed. 1019, and *Collins v. Hardyman,* 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253, and the denial by that court of petitions for writs of certiorari in numerous cases where judgments of dismissal in so-called "civil rights" cases have been upheld by this and other courts of appeal, indicate that motions to dismiss supply a useful technique

in disposing of this type of damage action (see *Agnew v. City of Compton* (supra), and cases cited therein).

In considering whether the second amended complaint states an enforceable claim for relief, the governing rule is stated in *Agnew v. City of Compton* (supra, at p. 229):

> "This brings us at once to the question of whether the complaint states a cause of action. It does so only if, under the *facts* alleged, there has been a deprivation of some right accorded appellant under one or more of the statutory and constitutional provisions on which he relies . . .." (emphasis supplied)

II

The second amended complaint fails to state an enforceable claim for relief against defendant Keller under any of the statutory and constitutional provisions upon which plaintiff relies.

Paragraph II of the second amended complaint states (Tr. 3):

> "That this action arises under the United States Constitution and particularly Article I, Section 8, Article IV, Section 4, Amendments XIII and XIV, and Laws of the United States, Title 18 U.S.C. 231, 241, 242; Title 28 U.S.C. Section 1331 and 1343; Title 42 U.S.C. 1981-1988; Title 52 U.S.C. Section 203."

1. Article 1, Section 8, Constitution of the United States.

Article 1, Section 8, deals generally with the powers of Congress. Apparently, plaintiff relies on the "necessary and proper clause" contained in clause 18 thereof. While it is undisputed that Congress may use appropriate means to enforce rights secured by the Constitution

or the laws of the United States, the question here is not whether Congress has such a power, but what Congress has done in exercise of the power. Plaintiff can base no claim for relief under this constitutional provision.

2. Article 4, Section 4, Constitution of the United States.

This provision provides that the United States "shall guarantee to every State in this Union a Republican Form of Government." This clause has been held to embrace political questions, rather than judicial matters (*Pacific States Telephone Company,* 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377), and it deals with the relationship between the Federal Government and the states, and not individuals (*United States v. Cruikshank,* 92 U.S. 542, 23 L. Ed. 558). It has no relevance to this case.

3. Amendment 13, Constitution of the United States.

This amendment prohibits slavery and involuntary servitude, except as punishment for a criminal conviction. Since it is not self-executing but contemplates legislative implementation, reference must be made to statutory law and not to the constitutional provision itself. However, the legislation enacted pursuant thereto clearly has no relevance here (see *Pollock v. Williams,* 322 U.S. 4, 64 S. Ct. 792, 88 L. Ed. 1095).

4. Amendment 14, Constitution of the United States.

The prohibition on state action contained in the second sentence of Section 1 of this amendment also is not self-executing but contemplates legislative implementation. Section 5 thereof gives Congress the power to enforce its provisions by appropriate legislation. The civil

enforcement statutes are the so-called Civil Rights Acts (42 U.S.C.A. §§ 1981-1988). Therefore, whether defendant Keller can be held liable to plaintiff for the alleged deprivation of his civil rights under the Fourteenth Amendment will be considered in the later discussion of the applicability of the Civil Rights Acts to defendant Keller.

5. Title 18 U.S.C. Sections 231, 241, 242.

There is no such section in the United States Code as 18 U.S.C. § 231. Sections 241 and 242 are criminal statutes, and " . . . provide no basis for this civil suit" (*Agnew v. City of Compton* (supra), at 239 F.(2d) 230; *Copley v. Sweet,* 133 F. Supp. 502 (W.D. Mich.), aff'd 234 F.(2d) 660, cert. den. 352 U.S. 887, 77 S. Ct. 132, 1 L. Ed. 91; *Mattheis v. Hoyt,* 136 F. Supp. 119 (W.D. Mich.); and see *Patten v. Dennis,* 134 F.(2d) 137 (CA9)).

6. Title 28 U.S.C. Sections 1331 and 1343.

These provisions confer jurisdiction on the court. They do not purport to define substantive rights and cannot be taken as a source of any enforceable claim for relief against defendant Keller (see *Agnew v. City of Compton* (supra), at 239 F.(2d) 229).

7. Title 52 U.S.C. Section 203.

There is no such section in the United States Code. Apparently, plaintiff meant to refer to 50 U.S.C.A. § 203. This section was repealed on August 10, 1956, and is now covered by Title 10 U.S.C.A. Section 333. This lat-

ter provision merely confers on the President a power to intervene in the affairs of the states when it appears that the states are unable to protect the civil rights of individuals. The statute does not impose any duties, either civil or criminal, upon the states or upon individuals. Accordingly, it has no relevance to this case.

8. Title 42 U.S.C. Sections 1981-1988.

These statutes upon which plaintiff founds his claim for relief against defendant Keller comprise the Civil Rights Acts. However, plaintiff cannot establish a right thereunder against defendant Keller, who is merely alleged to be "a duly licensed and practicing physician within the State of Oregon" (Tr. 4), or, as stated in plaintiff's brief, "Dr. Keller, a physician who makes examination in mental cases for the state" (App. br. p. 2).

There is a general conclusory allegation in the second amended complaint that all of the acts alleged in the complaint were committed by each of the defendants "while acting under color and pretense of the statutes, ordinances, customs and laws of the State of Oregon and were not committed in their individual capacity" (Tr. 5), but there are no facts whatsoever to show that defendant Keller was at any time acting under color of state law.

In substance, the facts pleaded show that Dr. Keller was appointed by the circuit judge of Multnomah County to make a medical and psychological examination as preliminary to a hearing conducted before the court on January 10, 1952, concerning plaintiff's mental competency.

It is then alleged that Dr. Keller committed the following acts or omissions (Tr. 10-11):

(a) Made a superficial examination of plaintiff;

(b) Certified that plaintiff was incompetent although he did not have sufficient data on which to base an intelligent judgment;

(c) Signed a certificate containing information gathered concerning plaintiff although the information was incomplete and unverified;

(d) Verified a statement concerning plaintiff which contained numerous inaccuracies;

(e) Refused plaintiff's request at the time of the hearing for an adequate mental examination;

(f) Participated in the hearing without objecting that plaintiff was being deprived of his constitutional rights;

(g) Failed to object when plaintiff was denied a full legal hearing and was not given an opportunity to summon counsel;

(h) Participated in the hearing without objecting despite the fact that he had the power to object to a hearing convened under an unconstitutional statute.

It is further alleged: (i) Dr. Keller refused to examine plaintiff at Morningside Hospital on August 5, 1952, although it was his duty to do so; (j) he refused to release plaintiff from Morningside Hospital although he knew that plaintiff was confined under proceedings wholly void; and (k) he refused to direct defendants Hansen and Halden to deliver the plaintiff to court rath-

er than to Morningside Hospital, after he or his agents knew that Halden and Hansen had disobeyed the court's order directing that plaintiff be delivered to court rather than to Morningside Hospital.

The court will take judicial notice of the relevant Oregon statutes. The proceedings about which plaintiff complains were had under the provisions of Chapter 571 of the Oregon Laws of 1949 relating to the apprehension, examination and commitment of mentally ill persons. Sections 3 and 4 thereof (now codified in ORS 426.110-426.130), provided:

> "Section 3. The judge shall appoint at least two competent physicians licensed by the state board of medical examiners for the state of Oregon to practice medicine and surgery one of whom may be the county health officer, to examine said person as to his mental condition; provided, however, that in counties having a population of 10,000 or less, as determined by the latest federal census, the judge may appoint only one such physician, who may be the county health officer, but the judge may, in his discretion, appoint additional physicians qualified as herein required, to assist in the examination of said person as to his mental condition. If the allegedly mentally ill person requests in writing that one additional examining physician be appointed, or, if in the absence of such request by the allegedly mentally ill person, such request is made by the legal guardian, relative or friend of such alleged mentally ill person, the court shall appoint a physician nominated in such request. Provided, however, that the court shall not appoint more than one such additional examining physician. Such physician shall be a resident of the state of Oregon.
>
> "Section 4. The physicians appointed shall examine such person as to his mental condition and

report their separate or joint findings in writing, under oath, to the court, which findings immediately shall be filed with the clerk of the court. Should said examining physicians find, and show by their verified findings that the person examined is mentally ill and by reason of mental illness is in need of treatment, care or custody, and should the judge, after having examined said verified findings and considered all competent evidence submitted to him, be of the opinion that such person is in need of treatment, care or custody, he shall adjudge such person to be mentally ill and order him committed to the proper state hospital; provided, that if the legal guardian, relative or friend of said mentally ill person request that he be allowed to care for him in a place satisfactory to the judge, and show that he, such applicant, is competent and financially able to care for such mentally ill person, and also if it appear to the court that such mentally ill person is not criminally inclined or violent, and that proper care and treatment can and will be provided him by such applicant, and that it would be to the best interest of such mentally ill person to be paroled, the judge may, in his discretion, order and direct that said mentally ill person be released and placed in the care and custody of such legal guardian, relative or friend making such application, but such order may be revoked and said mentally ill person committed to an Oregon state hospital whenever, in the opinion of the judge, it is for the best interest of such mentally ill person."

Under these statutes Dr. Keller's sole function was to examine plaintiff and report his findings in writing to the court. He had no powers of commitment under Oregon law; his only role was that of an expert witness. The statute plainly shows that it was incumbent upon the court, before adjudging plaintiff to be mentally ill, to consider all the competent evidence submitted, including

the doctors' findings. Obviously, the court could accept or reject Dr. Keller's report and decide the question of mental competency on other evidence, or upon the court's observations or examination of the alleged incompetent.

Therefore, the assertion that Dr. Keller made a negligent mental examination on insufficient data does not show that plaintiff thereby was deprived of any civil right by any acts done "under color of state law."

Reference to the Oregon statutes (Sections 1-4 of Chapter 571, Oregon Laws of 1949, now codified in ORS 426.070-426.130) demonstrates that Dr. Keller was under no duty whatsoever to object to the way the commitment proceeding was conducted by the court. It was solely the court's function to grant or refuse plaintiff's request for a physical examination, to safeguard plaintiff's constitutional rights, and to dismiss the proceeding if it found that the underlying statute was unconstitutional.

Furthermore, the claims against Dr. Keller arising out of an alleged refusal to examine plaintiff on August 5, 1952, his refusal to release plaintiff from Morningside Hospital, and his refusal to order defendants Hansen and Halden to deliver plaintiff to the court rather than to Morningside Hospital, are equally insufficient to show that Dr. Keller deprived plaintiff of any of his civil rights of any acts "under color of state law." It is not alleged that Dr. Keller had anything whatsoever to do in August, 1952, with the holding of plaintiff at Morningside Hospital; it is not claimed that Dr. Keller had

been ordered by the court either to restrain or release plaintiff at Morningside Hospital, or that Dr. Keller was empowered under state law to control the actions of defendants Halden and Hansen.

Thus, even if any deprivation of plaintiff's civil rights could be spelled out, plaintiff cannot state an enforceable claim against Dr. Keller. It is axiomatic that the Fourteenth Amendment and the Civil Rights Acts do not afford protection against activities of individuals not acting pursuant to or under color or authority of state law (*Collins v. Hardyman,* 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253; *Davidow v. Lachman Bros. Investment Co.,* 76 F.(2d) 186 (CA9), followed in *Schatte v. International Alliance, etc.,* 182 F.(2d) 158 (CA9), rehearing den. 183 F.(2d) 685, cert. den. 340 U.S. 827, 71 S. Ct. 64, 95 L. Ed. 608, rehearing den. 340 U.S. 885, 71 S. Ct. 194, 95 L. Ed. 643).

This proposition of law is not disputed by plaintiff (App. br. pp. 12, 34). Therefore, while plaintiff's brief hardly mentions Dr. Keller, plaintiff's counsel may argue that the alleged order of the circuit judge of Multnomah County appointing Dr. Keller to make an examination of plaintiff clothed Dr. Keller with sufficient authority and power under state law to give rise to his liability to plaintiff under the Civil Rights laws.

However, as above shown, Dr. Keller had no powers of commitment or supervision over plaintiff under the state statutes. His sole function was to make a written report to the court as to plaintiff's mental competency, which the court could accept or reject as it saw fit. Dr. Keller's role was that of an expert witness.

Under these circumstances, the governing rule is stated by Judge Orr in *Schatte v. International Alliance, etc.* (supra), at 182 F.(2d) 167:

> "Making representations to a state official, even in a report required by law, is not acting 'under color of law' because it does not purport to be done on behalf of the state . . ."

A necessary corollary is that a person who files an affidavit or testifies under oath in a state court proceeding acts only as a private citizen and not under color of state law (*Smith v. Jennings,* 148 F. Supp. 641, 645 (W.D. Mich.) [collecting cases]; *Campo v. Niemeyer,* 182 F.(2d) 115 (CA7)).

On this point, three recent appellate court decisions are particularly pertinent.

In *Kenney v. Hatfield,* 132 F. Supp. 814 (W.D. Mich.), aff'd *sub nom Kenney v. Fox,* 232 F.(2d) 288 (CA6), cert. den. 352 U.S. 855, 77 S. Ct. 84, 1 L. Ed. (2d) 66, plaintiff had been adjudged mentally ill and was ordered committed by a state court. The commitment petition was made by a deputy sheriff on the recommendation of defendant Robinson, a practicing lawyer. Subsequently, the commitment proceedings were determined to be void. Kenney then sued the judge, Mr. Robinson and two doctors on the staff of the state mental hospital under the Civil Rights Act. The district court granted the motions of defendants to dismiss for failure to state a claim. With respect to Mr. Robinson, the court held (132 F. Supp. at p. 817):

> "As to the defendant, Thomas N. Robinson, the allegations of plaintiff's complaint are to the effect

> that said defendant, then an attorney in private practice, advised Deputy Sheriff Pugh in connection with the preparation of the petition which was filed as the first step in the proceedings which resulted in plaintiff's commitment to the Kalamazoo State Hospital. There is no allegation that the defendant Robinson was acting in any official capacity or that any of his acts, proper or improper, could be classed as the acts of the State of Michigan, except as the petition was made allegedly pursuant to the provisions of the statutes of the State of Michigan. No case has been discovered wherein the Civil Rights Statute, on which plaintiff bases his action, has been held to give one in the position of the plaintiff an action against a private individual not acting 'under color of law' for wrongs done, even though the acts of such individual may have ultimately resulted in a deprivation of constitutional rights, privileges or immunities. Rather such statute appears to have been limited in application to persons who have used or misused the powers granted to them by virtue of political offices, held by them, for the purpose of *wilfully* depriving a person of constitutional rights, privileges or immunities [citations]."

The *Kenney* case was reaffirmed very recently by the Court of Appeals for the Sixth Circuit in *Cuiksa v. City of Mansfield,* 250 F.(2d) 700. In one case, plaintiff Smith had been fined for a minor traffic violation. The judgment was subsequently set aside because it was discovered that the village had no ordinance making the conduct complained of an offense. Basing his damage claim for $200,000 upon the Civil Rights Acts, plaintiff sued the village, the judge and the constable who executed the affidavit which initiated the prosecution. In following this court's decision in *Agnew v. City of Compton* (supra), the appellate court affirmed a summary judgment in favor of defendants. With respect to

the claim against the constable, the court held (250 F. (2d) at p. 704):

> "In case No. 13,228, a constable of the village of Butler was also made a defendant. The constable filed an affidavit against the appellant Smith charging him with passing on the right, which initiated the prosecution. Appellant was not placed in custody by the constable or physically restrained. At the trial the constable testified as a witness. We held in *Kenney v. Fox,* supra, 232 F.2d 288, 290, that neither an attorney who prepared the papers initiating the prosecution, nor the prosecuting attorney who prosecuted the case, was liable for damages under the Civil Rights Act. The actions of the constable in initiating the prosecution and in testifying did not deprive the appellant of any constitutional right. Nor is he responsible for the subsequent actions and rulings of the judge. *Whittington v. Johnston,* 5 Cir., 201 F.2d 810, 811-812, certiorari denied 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377, cited by us with approval in *Kenney v. Fox,* supra, and *Bartlett v. Weimer,* 6 Cir., 244 F.2d 955. Appellant Smith had no cause of action under the Civil Rights Act against the constable."

Both of these decisions of the Sixth Circuit, as well as this court's opinion in *Dineen v. Williams,* 219 F. (2d) 428, 430 (CA9), cite with approval the case of *Whittington v. Johnston,* 201 F.(2d) 810 (CA5), cert. den. 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377. In that case the complaint alleged that the defendants, all private citizens, conspired and caused plaintiff to be declared insane by an Alabama state court and to be confined in a county jail. It was claimed that defendant Dr. Johnston, acting at the request of the four other defendants, signed a false medical certificate that plaintiff was insane and thus invoked the statutory procedure which

contained no mandatory provision for a hearing prior to commitment. In affirming dismissal of the complaint upon defendants' motions, the court held that the Civil Rights Acts do not require those who regularly institute a lunacy proceeding under a state statute to stand sponsor for the validity of the statute, or the acts of state officers administering it, and that if there was any denial of due process, the responsibility was upon the state court judge, and not upon defendants.

So, in the instant case, the duty to accord plaintiff due process of law at every stage of the proceedings rested upon the circuit judge, not upon defendant Keller. No act is alleged upon the part of defendant Keller which proximately resulted in any alleged deprivation by plaintiff of his constitutional rights.

We will not burden the court with a further discussion of the authorities. Plaintiff's counsel has cited a dozen or more cases (Plf's br. pp. 21-32) in which complaints presenting completely different factual allegations have been deemed sufficient to state causes of action under the Civil Rights Acts. How any of these cases assist plaintiff in sustaining the pleading at bar is not apparent. Moreover, it may be noted that several of the cited cases, such as *McShane v. Moldovan,* 172 F.(2d) 1016 (CA6), *Burt v. City of New York,* 156 F.(2d) 791 (CA2), *Picking v. Pennsylvania R. Co.,* 151 F.(2d) 240 (CA3), *Glicker v. Michigan Liquor Control Commission,* 160 F. (2d) 96 (CA6), and *Bomar v. Keyes,* 162 F.(2d) 136 (CA2), were decided prior to the decisions of the United States Supreme Court in *Tenney v. Brandhove,* 341 U.S.

367, 71 S. Ct. 783, 95 L. Ed. 1019, and *Collins v. Hardyman,* 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 253, and may not be good law today (see *Kenney v. Fox,* 232 F.(2d) at pp. 292-293, and *Cuiksa v. City of Mansfield,* 250 F.(2d) at p. 703).

CONCLUSION

Plaintiff's counsel also asks for a reversal on the ground that Chief Judge McColloch "felt that the case had sufficient merit to warrant setting aside a previous order dismissing the case for failure to prosecute (Supp. Tr. 31)" (App. br. p. 34). On this point, the record shows only that on an *ex parte* application of plaintiff's counsel the court vacated its previous order of dismissal for failure to prosecute. At that point in the proceedings the only pleading before the court was the original complaint prepared and filed by plaintiff *pro se.*

Upon the "evidence of the plaintiff and representations of counsel" as to the reasons for failure to prosecute the action, Judge McColloch did no more than afford plaintiff an opportunity to have an attorney plead his case. Since that time plaintiff's counsel has had ". . . two opportunities to make allegations of any 'facts' which would differentiate this from a cause cognizable in a federal court only by diversity of citizenship, which would necessarily appear in the pleadings" (*Dineen v. Williams,* 219 F.(2d) 428, 429 (CA 9)). The second amended complaint fails to allege facts showing that defendant Keller has deprived plaintiff of any constitutional or civil rights under the statutes pleaded therein.

The judgment below, insofar as it dismisses this action as against defendant Keller, should be affirmed, with costs.

Respectfully submitted,

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